

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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IN RE:

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE-EXAMINATION OF THE POLICY)
STATEMENT ON COMPARATIVE)
BROADCAST HEARINGS)

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TO: THE COMMISSION

COMMENTS OF CHANNEL 47 LIMITED PARTNERSHIP

CHANNEL 47 LIMITED PARTNERSHIP ("Channel 47") by its attorneys and pursuant to Section 1.415 of the FCC's Rules, hereby submits its Comments in response to the Second Further Notice of Proposed Rulemaking, FCC 94-167 (released June 22, 1994) ("Second Notice").

Introduction

Channel 47 is a single station owner (WMSN-TV) which is operating its station via a state court appointed receiver following removal of its general partner corporation for violation by the control person of the general partner of its fiduciary duties to the partnership. Channel 47's license renewal application for its television station is the subject of a competing application that has not been designated for hearing. (File No. BRCT-920729 KF) The competing applicants are the control officer/directors of the removed general partner corporation.

In these Comments, Channel 47 will address the FCC's comparative criteria insofar as they may apply to comparative license renewal proceedings.

1. During its deliberation as to appropriate comparative standards, the FCC should open a brief "window" during which the current restrictions on settlement payments and "white knight" settlements

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would be waived.

2. The FCC should adopt more stringent criteria for acceptable competing applications, similar to those adopted in the Cellular Renewal proceedings.
3. The FCC should consider adopting a bifurcated hearing procedure for competing broadcast applications, similar to the procedure for competing broadcast applications, similar to the procedure adopted in the Cellular Renewal proceeding.
4. The FCC's renewal expectancy preference should be available to companies where a receiver or trustee has been appointed to operate the entity on an interim basis where the operator/control person(s) have been removed due to breaches of fiduciary duty or willful misconduct related to the licensee entity.
5. The FCC's comparative criteria should be based on verifiable structural factors rather than illusory predictive factors that are not enforced by the FCC or other factors not shown to have discernible public interest benefits.

Argument

1. Settlements should be encouraged.

Because settlements of pending cases would provide public interest benefits, but are either discouraged or not allowed under the status quo Channel 47 urges the Commission to open a brief "window in which comparative renewal proceedings could be settled based on waivers of Section 73.3523 and/or the current "white knight" policy. Because any competing applications affected by such a window either were filed under the current rules or have been prosecuted for at least five years, the FCC should presume, subject to the possibility of a showing to the contrary in any particular case, that those applications were not filed for purposes of extracting a "greenmail" payment.

Adopting this proposal would provide a clear opportunity and incentive to settle a number of difficult and protracted cases which are presently "frozen" and as to which the underlying criteria are not known and will be subject to court challenge over a period of years. Such a one-time waiver of current policy, adopted under these unique circumstances, would not encourage the filing of abusive applications, particularly if the reform proposals discussed in the

following section are adopted.

2. **More Stringent Criteria for Acceptance of Competing Applications Are Needed.**

The single most important factor underlying the filing of abusive competing applications is the FCC's lax standards for acceptance of such applications. The FCC presently accepts applications based solely upon self-certification of financial ability and site availability. Commercially worthless financing letters and "reasonable assurance" site letters (or conversation) are accepted as "run of the mill" documentation. These lax standards have let to the filing of applications which should never be accepted, but instead extend into years of litigation based on the hope that the incumbent will somehow be wounded or bled dry in litigation, prompting a pay-off (notwithstanding §73.3523). Adopting meaningful acceptability standards for competing applications, and applying those standards to existing applications (following an opportunity for amendments), would be an important step toward eliminating abusive applications.

The FCC recognized the need for such meaningful standards in the Cellular Renewal proceeding. In that proceeding the FCC adopted Section 22.917(g) of its rules, requiring that a challenger demonstrate in its application that, inter alia it has a firm financial commitment, an irrevocable letter of credit or a performance bond from a recognized financial institution or equipment supplier, or sufficient internal resources, for its realistic budgeted costs of construction and first year of operation. The FCC also adopted Section 22.940, requiring that the challenger submit as part of its application written confirmation from the site owner of the availability of the applicant's proposed antenna-transmitter site(s) for the proposed use.

In particular, no competing applications should be accepted from parties who were, in effect, removed from a current licensee for breach of fiduciary duty, willful misconduct or fraud.

3. **The FCC Should Consider Adopting a Bifurcated Renewal Procedure for Broadcast Applicants Similar to That Adopted for Cellular Applicants.**

In the Cellular Renewal proceeding, the FCC adopted a two-step renewal hearing procedure. Under this procedure, if a licensee demonstrates in a threshold paper hearing that it is entitled to a renewal expectancy based on specific performance criteria applied to the past license term, competing applicants will not be considered eligible for the license in question.

The FCC recognized that a similar procedure for broadcast renewal applications had been invalidated in 1971 by the U.S. Court of Appeals for the D.C. Circuit. See Citizens Communications Center v. FCC 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972). However, the FCC concluded that the holding in Citizens could be distinguished from the cellular context or, alternatively, the court could be persuaded to overturn Citizens because it no longer represents the court's current thinking in this area, in light of Hispanic Information & Telecommunications Network, Inc. v. FCC 865 F.2d 1289, 1294 (D.C. Cir. 1989), and other decisions.

This methodology should be complied with the above criteria governing standing to file a Competing Application on a threshold basis to avoid long and costly administrative proceedings designed to extort access to a station through cost and delay.

4. The Renewal Expectancy Preference
Should be Available to Companies
Operating via an Interim Receiver
Appointed Following Judicial Removal
of a Control group for Malfeasance.

As stated above, Channel 47 is presently involved in comparative license renewal proceedings involving its Madison, Wisconsin television station, WMSN-TV. The competing application was filed not as a result of any shortcomings in Channel 47's record as a public trustee, but merely because the competing applicants were thrown out of the company for breach of fiduciary duty to the company and its investors. The theory underlying the competing applications appears to be that the company will undergo an internal transfer of identity of its general partner and thereby lose its claim to a renewal expectancy, with the removed persons claiming entitlement to such status. The qualification of the competing licensee to file under these circumstances is subject to scrutiny but, in all fairness, such parties should not be allowed to profit from their wrongdoing by having the innocent investors lose the Renewal Expectancy

Preference because the former control group is removed from power for malfeasance.

5. **The FCC's Comparative Criteria Should Be Based on Verifiable Structural Factors.**

The FCC's Second Notice strongly suggests a desire on the part of the FCC to adopt a minimal, incremental set of changes in its substantive criteria in response to the court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Channel 47 urges the FCC to resist this approach. The Bechtel decision presents the FCC with the opportunity to rewrite its standards to reflect reality. Such an opportunity should not be wasted.

Channel 47 submits that the FCC should be guided by the following principles in comparative renewal proceedings where a renewal expectancy is not dispositive:

Integration Cannot Be Revived. The FCC tried twice and utterly failed twice to justify its integration criterion in the Bechtel case. The entire integration structure, with its various substructures, must be abandoned.

Verifiable Structural Factors Should Be Used. The most serious shortcoming of the integration factor was that it was based on predictions of future actions, without any accompanying enforcement mechanism. The FCC instead should look to verifiable structural factors that provide cognizable public interest benefits.

On the other hand, the FCC should discard comparative factors that don't provide clear public interest benefits. Local ownership, as indicated in Bechtel v. FCC, 957 F.2d 873, 879 (D.C. Cir. 1992) is a highly questionable factor given the prevalence of professional managers in the broadcast industry. Likewise, involvement of station ownership in local civic activities does not necessarily provide public interest benefits, given the likelihood that a station's professional managers similarly will be involved in local civic activities.

Conclusion

Prior to the adoption of new comparative criteria, the FCC should open a "settlement window" during which it will waive Section 73.3523 of the Rules and

its "white knight" policy. Such a window would provide public interest benefits by allowing the settlement of a number of cases that otherwise could entail lengthy and costly litigation under presently unknown criteria.

The FCC should also adopt acceptability criteria for competing applications similar to the criteria adopted in the Cellular Renewal proceeding. This long overdue step could also be taken while the comparative criteria are being considered. Not only would this action eliminate most abusive applications it would simplify the use of new comparative criteria by reducing the number of competing applicants. In particular, the FCC should deny standing to file to any person directly or indirectly removed by judicial process from a company for breach of fiduciary duty, willful misconduct or fraud.

The FCC also should consider adopting a bifurcated license renewal procedure patterned after the procedure adopted in the Cellular Renewal proceeding. Channel 47 also urges the FCC to rule that the renewal expectancy preference is available to companies operated by an interim receiver following removal of its control group by judicial act for malfeasance to the entity.

Dated this 20th day of July, 1994

Respectfully submitted

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